

Policy - Consent to Water Right/Change Issuance

Purpose

This policy establishes a procedure and criteria by which Montana Fish, Wildlife & Parks (FWP) may provide consent to the issuance of a Provisional Permit pursuant to §85-2-311(9), MCA or a Change in Appropriation Right pursuant to §85-2-402(19), MCA that would adversely affect an instream, inlake or reservoir fishery or recreation water right held by FWP. This policy does not apply to waivers for replacement points of diversion provided for in §85-2-402(18), MCA which are administered by the Water Program Staff in cooperation with Regional Fisheries Staff.

Background

In certain situations, fishery or recreation water rights held by FWP, and the habitats they support, would be adversely affected by the issuance of a new water right or a change in an existing water right, thus preventing Department of Natural Resources and Conservation (DNRC) from issuing the new permit or change authorization. Statutes provide that with the consent of the adversely affected party, DNRC may not include the consenting party's water right in its adverse effect assessment, allowing for the issuance of the new permit or change authorization. In some situations, the water right applicant is not directly able to mitigate the hydrologic and related fishery habitat impacts at the time and/or location of the impact but is able to provide offsetting hydrologic or physical habitat mitigation at another time and/or location. In these situations, FWP would evaluate the negative and positive impacts to the fishery and determine whether to provide consent based on the criteria found in this policy.

Policy

FWP, with the approval of its Director, may consent to issuance of a Provisional Permit pursuant to §85-2-311(9) or a Change in Appropriation Right pursuant to §85-2-402(19) that would adversely affect an instream, inlake or reservoir water right held by FWP only when the following conditions are met, as applicable:

Criteria

General - All Situations

1. The overall aquatic habitat conditions and the resulting fishery benefits under the proposed project would be as good or better than existing conditions.
2. The proposed project is clearly administrable; i.e., there is a plan and/or means of protecting new fishery benefits that offset negative fishery impacts.
3. The applicant must minimize the proposed use of water by making such use as efficient as is reasonably feasible.

4. The consent contains a contingency that is void if DNRC subordinates FWP's rights as a result of the consent unless FWP agrees to the subordination. In cases where FWP agrees to subordination, the consent must be contingent on the amount subordinated being no more than the amount of actual net reduction in surface flow at any given time.

Groundwater Permit Mitigation Only

In addition to Criteria 1-4 above, for a groundwater permit application where proposed mitigation does not match the timing and location of depletion the following additional criteria must be met:

5. The applicant must provide convincing evidence that a substantial and determined effort has been made to find a means of providing hydrologic augmentation and mitigation that matches the timing and location of depletion.
6. The proposed mitigation plan must provide for full volumetric replacement of water depleted from the water source on an annual basis.
7. At a minimum, overall impacts to the fishery will not be increased or fishery resources lessened when mitigation occurs in a source, stream reach, or time that is different than the depletion caused by the application. Preferably the fishery will experience a net benefit.
8. In cases where timing or location of mitigation does not match hydrologic depletions, physical aquatic habitat restoration may be considered adequate to offset hydrologic habitat losses. Off-site mitigation may be considered if it can be shown to have a net benefit to a fishery in that water, utilizing physical habitat restoration or water conservation measures..
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9. In applicable situations such as subdivisions, future water development using the small groundwater developments not exceeding 35 gallons per minute and 10 acre-feet per year exempt from the regular water right permitting process shall be legally precluded or limited to assure no negative impacts to the fishery.

Procedure

Following is the procedure to decide to grant or deny consent to the issuance of a new permit or change in water right.

1. The water right applicant contacts FWP Regional Fisheries Staff or Water Program Staff requesting consent. Regional Fisheries Staff notify Water Program Staff of the request or *vice versa*.
2. Water Program Staff determines the nature and hydrologic impacts of the request and if necessary, collects additional information from the applicant, DNRC or other sources. If sufficient information is not available to make a determination, the request does not proceed further until sufficient information is provided to FWP.
3. Based on the hydrologic and habitat impacts, Regional Fisheries Staff and Water Program Staff together evaluate the impacts to the fishery and determine if a consent is warranted based on the criteria and if any conditions to the consent are appropriate in order to satisfy the criteria. This evaluation should consider cumulative effects.
4. Water Program Staff reviews the DNRC Technical Report which is the final technical assessment of the water right application to ensure no modifications to the application have been made which would alter the impacts to the fishery.
5. The Regional Fisheries Manager and Water Program Staff make a recommendation to the Fisheries Division Administrator to deny, grant or grant the consent with specific conditions.
6. The Fisheries Division Administrator may approve, modify or deny the recommendation. In circumstances where the Administrator denies the consent, the request does not proceed further, and Water Program Staff will notify the applicant of the denial and the reasons for the denial. In cases where approval is recommended by the Administrator, Water Program Staff shall then prepare an environmental assessment that addresses the potential impacts of the project. The Administrator may require the requestor to reimburse the Department for the cost of preparing the EA. The EA shall be published and publicly comment accepted for a minimum of 14 days. At the close of the public comment period, the Administrator shall prepare a proposed record of decision for the Director with any proposed modifications and conditions.
7. The Director may approve, modify or deny the recommendation. In circumstances where the Director denies the consent, Water Program Staff will notify the applicant of the denial and the reasons for the denial.